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Measure of liability for broker misrepresentation: Fragale v Faulkner, 2003

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Measure of damages for broker's intentional misrepresentation to buyer for whom he acts as agent is not limited to buyer's out-of-pocket losses, and damages may be measured by benefit-of-the-bargain rule.

Fragale v Faulkner (2003) 110 CA4th 229, 1 CR3d 616

In May 1998, Fragale met real estate broker Messing at an open house held by Messing at the Faulkner home. At Messing's suggestion, Fragale decided to use Messing as his agent because Messing offered to give Fragale $3300 of his commission. Several months after Fragale bought the home, he sued the seller, Faulkner, and Messing, for intentional and negligent misrepresentation. Fragale claimed that Faulkner and Messing had falsely represented that an addition, which was constructed without permits, presented no structural defects or safety problems. Fragale claimed that, in actuality, material construction defects were hidden from view behind paneling installed by Faulkner. The case proceeded to trial.

At the close of Fragale's case-in-chief, Messing moved for nonsuit, contending that Fragale had offered no admissible evidence that the property had diminished in value, as required under CC §3343. The trial court ruled that diminution of value had not been established and allowed the case "to go to the jury on subparagraph 2 of BAJI, 12.56, namely, the cost of the repair." The jury returned special verdicts against Messing, finding him liable for intentional misrepresentation and negligent misrepresentation, and awarded damages of $19,000 on both causes of action. The trial court granted Messing's motion for JNOV on the grounds that Fragale had offered no evidence of an intentional misrepresentation, and no evidence of the value of the property at the time of transfer.

The Second District Court of Appeal held that the trial court erred in concluding that Fragale failed to present appropriate evidence of damages caused by Messing's misrepresentation. Since Messing was the agent for Fragale as well as Faulkner, he was his fiduciary. Under *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 44 CR2d 352, the damages for fraud by a fiduciary are measured under CC §3333, not §3343. The court concluded that the measure of damages for Messing's intentional misrepresentation was not confined to actual or out-of-pocket losses, but may be measured by the benefit of the bargain. The court acknowledged a lack of uniformity on whether a measure of damages other than out-of-pocket losses may be applied in the case of an intentional misrepresentation by a fiduciary, noting that the Fifth District has concluded that out-of-pocket loss is the appropriate measure of damages for intentional fraud by a fiduciary. See *Hensley v McSweeney* (2001) 90 CA4th 1081, 1086, 109 CR2d 489.

Since the measure of damages was not limited to Fragale's out-of-pocket loss, the trial court was not required to penalize him for failing to establish that loss by showing the difference between the amount paid for the house and what it was worth as a result of Messing's intentional misrepresentation. The court pointed out that the jury's award was presumably based on the evidence presented on the cost of repair, and that the award effectively placed Fragale in the

position he would have enjoyed if Messing's false representation had been true by enabling him to put the property in the condition he believed it to be in at the time of purchase. The court also noted that any significant difference between out-of-pocket loss (the difference between the amount paid and the value of the non-code-compliant house received) and the cost of repair was unlikely.

The court reversed the judgment insofar as the trial court entered the JNOV on Fragale's claim of intentional misrepresentation against Messing. In that respect, the court remanded with directions to enter judgment in accordance with the jury's special verdict finding that Fragale suffered damages of $19,000 as a result of Messing's intentional misrepresentation.

THE EDITOR'S TAKE: Only a generous appellate court saved plaintiffs' counsel from losing a decent case for lack of preparatory research. When the seller conceals construction defects from the buyers and the broker passes along the same lulling false assurances, the buyers' recovery against both parties should be easy: The sellers and the broker are liable for fraud under CC §3343; and the broker—if he is a dual agent—is also liable in tort under CC §3333.

Either theory, however, requires putting in evidence of the value of the property. Under §3343, damages are measured by the difference between the value of the property plaintiffs received and the price they paid for it; under §3333, damages are the difference between the value of the property they received and the value it should have had if the representations made had been true. Under either formula, the actual value of the property is a factor, and you have to get someone to testify to it.

This is what the plaintiffs' attorney forgot to do, and his clients were saved only because the court of appeal decided that the cost of repairs (which had been proven) was an acceptable substitute for the "as-is versus as-represented" measure of damages allowed by §3333. This determination saved the plaintiffs' $19,000 award against their broker for intentional misrepresentation, although it did nothing for their $12,000 negligent misrepresentation award against the broker, or their $16,000 awards against the seller for intentional and negligent misrepresentation. (It is not clear to me why the cost of repairs is an acceptable substitute in §3333 cases and not in §3343 cases: If $20,000 in repairs will fix the defects, I should think that would make it a legitimate measure of loss in either situation.)

The court's other holding sympathetic to the plaintiffs was that reckless misrepresentation by a fiduciary in a real estate sale comes under §3333, rather than §3343, in light of the fact that the supreme court has held that negligent misrepresentation comes under §3343. That may become the rule, but I daresay we might all be better off if did not. I would not look forward to having to prepare testimony for a case on behalf of buyers against both their seller and their broker when two such incompatible measures of damages must be employed at the same time—unless, that is, this discrepancy can be somehow parlayed into obtaining two recoveries for one loss! —*Roger Bernhardt*